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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 JUSTIN BROSSARD,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of  
15 Social Security Administration,

16 Defendant.

CASE NO. C09-5072BHS

REPORT AND RECOMMENDATION

NOTED FOR: March 12, 2010

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18 This matter has been referred to Magistrate Judge J. Richard Creatura pursuant to 28  
19 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews,  
20 Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter is before the court on  
21 plaintiff's motion for an award of fees and costs (Doc. 23) and motion to extend time (Doc. 29).  
22 After reviewing the record, the undersigned recommends that the Court grant the motion to  
23 extend time and the underlying motion for EAJA fees.

24 **INTRODUCTION AND PROCEDURAL HISTORY**

25 On February 9, 2009, plaintiff filed a Complaint to obtain review of the Commissioner's  
26 final administrative decision. On September 10, 2009, the Court issued an Order, based on the  
REPORT AND RECOMMENDATION - 1

1 stipulation of the parties, reversing and remanding this case pursuant to sentence four of 42  
2 U.S.C. § 405(g). (Doc. 21). A judgment reversing and remanding this case for further  
3 administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g) was also filed on  
4 September 10, 2009. (Doc. 22).

5         Ninety-one days later, on December 10, 2009 -- one day late -- Plaintiff filed a Motion  
6 for Attorney's Fees and Expenses under the EAJA, requesting attorney's fees in the amount of  
7 \$6,219.16 and expenses in the amount of \$19.60. (Doc. 23)

### 8   DISCUSSION

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10         This motion illustrates why courts should allow exceptions to rules when those same  
11 rules allow for such exceptions. The first rule is to do justice, and justice is better served here by  
12 granting plaintiff's motion for a one-day extension to file a meritorious petition for fees and  
13 costs.

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15         "The Equal Access to Justice Act (EAJA or Act) departs from the general rule that each  
16 party to a lawsuit pays his or her own legal fees." Scarborough v. Principi, 541 U.S. 401, 404-05  
17 (2004), (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975)).  
18 Under EAJA, "[a] party that prevails against the United States in a civil action is entitled, in  
19 certain circumstances, to an award of attorney's fees, court costs, and other expenses[,]" Flores v.  
20 Shalala, 49 F.3d 562, 566 (9th Cir.1995), but not when the "court finds that the position of the  
21 United States was substantially justified...." 28 U.S.C. § 2412(d)(1)(A).

22  
23         EAJA, however, limits the time during which a claimant may file a fee application. 28  
24 U.S.C. § 2412(d)(1)(B). Under § 2412(d)(1)(B), "[a] party seeking an award of fees and other  
25 expenses shall, *within thirty days of final judgment in the action*, submit to the court an  
26 application for fees and other expenses which shows that the party is a prevailing party and is

1 eligible to receive an award under this subsection....” *Id.* (emphasis added). Section  
2 2412(d)(2)(G), in turn, provides that “ ‘final judgment’ means a judgment that is final and not  
3 appealable....” *Id.* As a result, in order to be timely, a party seeking attorneys' fees must file his  
4 application within 30 days after a “judgment that is final and not appealable.” *Id.*

5         The Supreme Court has explained that the 30-day period in § 2412(d)(1)(B) begins to run  
6 only after the appeal period has run. Melkonyan v. Sullivan, 501 U.S. 89, 95-96, (1991); *see*  
7 Hoa Hong Van v. Barnhart, 483 F.3d 600 (9<sup>th</sup> Cir. 2007)(a claimant, following a remand under  
8 either sentence four or six of 42 U.S.C. § 405(g), may file a fee application within 30 days after  
9 the 60-day appeal period in Rule 4(a) has expired).

11         Here, plaintiff’s motion for attorneys' fees under EAJA was one day late. Plaintiff does  
12 not deny that the motion for fees was filed late, but asks the court to excuse his neglect to file on  
13 time. Plaintiff asks the court to (i) treat his motion for attorneys fees as an amendment to the  
14 request that was stated in the complaint, (ii) to “either issue a Judgment nunc pro tunc dated one  
15 day after the judgment that was issued in this case, which would effectively extend the filing  
16 deadline by one day, or to extend the filing deadline for this motion by one day pursuant to  
17 FRCP 6(b)(1)(B), as the EAJA Motion was filed one day late due to excusable neglect”, or  
18 simply, grant his motion for an extension of time to file the fee application, Doc. 29.

20         The undersigned recommends granting the motion to extend time and therefore accepting  
21 the motion for fees for the following reasons. First, the 30-day period in § 2412(d)(1)(B) is not  
22 jurisdictional. Scarborough v. Principi, 541 U.S. 401, 402 (2004). Second, Rule 6 of Federal  
23 Rules of Civil Procedure allows the court to accept untimely motions due to excusable neglect.  
24 Fed. R. Civ. P. Rule 6(b)(1)(B). Here, plaintiff’s counsel explained that he filed it late because  
25 of the pressures of private practice. He stated:  
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1 I filed it late because I was exhausted from too many briefs and too many  
2 administrative hearings in too short a time. I was confused about the due date for  
3 this Motion; although my calendar showed the due date as December 9th, I  
4 mistakenly thought the Motion was due thirty days after December 9th, not on  
5 December 9th.

6 This judge is not so removed from private practice to have forgotten the many demands  
7 that sometimes cause an otherwise very competent attorney to have a momentary lapse. Courts  
8 should decide issues on the merits whenever possible, rather than on technicalities. Fed. R. Civ.  
9 P. Rule 6(b)(1)(B) allows the court to grant exceptions to rules when rules get in the way of  
10 deciding things on their merits.

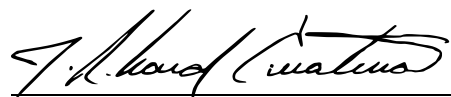
11 After considering the record, this court finds filing of the motion for EAJA fees one day  
12 late was excusable neglect and the motion for an extension of time should be granted under Rule  
13 6 of the Federal Rules of Civil Procedure.

#### 14 CONCLUSION

15 Based on the foregoing discussion, the Court should grant plaintiff's motion to extend the  
16 time to file his motion for fees and grant the underlying motion for EAJA fees.

17 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
18 Procedure, the parties shall have fourteen (14) days from service of this Report to file written  
19 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
20 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
21 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
22 March 12, 2010, as noted in the caption.

23 DATED this 17<sup>th</sup> day of February, 2010.

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26 J. Richard Creatura  
United States Magistrate Judge